Supreme Court, U.S.
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No. 98-1763

In The

Supreme Court of the United States

THE STONE CASKET COMPANY
OF OKLAHOMA CITY,

Petitioner,

versus

STATE OF OKLAHOMA, *ex rel.*,
STATE BOARD OF EMBALMERS
AND FUNERAL DIRECTORS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Oklahoma Court of Civil Appeals erred in concluding that 59 OKLA. STAT. Tit. 59, §§ 396.3a(1)(c) and 396.6(A) were constitutional.

2. Whether the Oklahoma Court of Civil Appeals properly analyzed the Equal Protection claim presented in this case.

PARTIES

The parties to this appeal before the Supreme Court of the State of Oklahoma were the Stone Casket Company of Oklahoma City, defendant in the District Court, appellees in the Court of Civil Appeals and petitioners herein and the State of Oklahoma, *ex rel.*, State Board of Embalmers and Funeral Directors, plaintiff in the District Court and the appellant in the Court of Civil Appeals.

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GROUNDS FOR JURISDICTION IN THIS COURT

This Petition for a Writ of Certiorari seeks review of the Order of the Oklahoma Supreme Court, Case No. 90, 123, filed and entered by that Court on February 2, 1999. Jurisdiction in this Court is conferred under 28 U.S.C. § 1257.

STATUTES AND RULES INVOLVED IN THE CASE

Constitution of the United States, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Relevant portions of OKLA. STAT. Tit. 59, §§ 396.3a(1)(c), 396.6(A) (Supp. 1997), the Oklahoma Funeral Services Licensing Act, are set forth in the Petitioner's Appendix.

STATEMENT OF THE CASE

The State of Oklahoma, *ex rel.*, State Board of Embalmers and Funeral Directors ("Respondent" or the "State"), filed Petition for a Permanent Injunction and an Application for a Temporary Restraining Order seeking to

enjoin Stone Casket Company ("Petitioner" or "Stone Casket") from selling caskets to the public in violation of the Oklahoma Funeral Services Licensing Act (the "Act"). The matter was set before the Honorable Judge Amick, District Court Judge of Oklahoma County (hereinafter referred to as the "District Court"). The District Court issued the Temporary Restraining Order and subsequently set the matter for hearing on the Temporary Injunction.

Petitioner filed an Answer to the Petition for Permanent Injunction, as well as a Petition for Declaratory Action to determine the constitutionality of the Act. Stone Casket alleged in its Declaratory Petition that the statutes violated its equal protection rights under both the United States and Oklahoma Constitutions.

On April 30, 1997, a hearing was held on all issues and the District Court dissolved the Temporary Restraining Order and denied Respondent's request for a Temporary Injunction. The District Court then declared OKLA. STAT. Tit. 59, §§ 396.3a(1)(c), 396.6(A) (Supp. 1997) to be unconstitutional. The District Court concluded that the above-referenced statutory provisions violated, among other things, the Equal Protection Clause of both the Oklahoma and United States Constitutions and, infringed on Petitioner's right to the pursuit of happiness and the enjoyment of gains of their industry.

The State then filed a Motion to Reconsider and a Motion to Stay the District Court's Order. The request for reconsideration of the constitutionality of the statute was denied; the District Court stayed the effect of its ruling until the matter was heard by the Oklahoma Supreme

Court. The State then appealed the District Court's decision and the appeal was heard before the Oklahoma Court of Civil Appeals, Division 1 (the "Court of Civil Appeals").

The Court of Civil Appeals issued an Order on October 2, 1998, reversing the District Court's decision. The Court of Civil Appeals found that the District Court erred in its determination that these statutes were unconstitutional and found that their enactment constituted a proper exercise of the police powers of the State. In so holding, the Court of Civil Appeals concluded that, since neither a fundamental right nor suspect classification was involved, the statutes should be reviewed under the rational basis test. In reviewing the statute under that test the Court concluded that there was a rational basis for the statutes and reversed the District Court's ruling. The Court of Civil Appeals then granted the injunctive relief to the State, restraining Petitioner from selling caskets to the general public. Petitioner Petitioned the Court of Civil Appeals for rehearing and the Court denied the Petition on November 9, 1998.

Petitioner then Petitioned the Supreme Court of the State of Oklahoma for a Writ of Certiorari and the Court denied the Petition on February 2, 1999.

REASONS FOR DENYING THE WRIT

The Writ of Certiorari should not issue in this case for several reasons.

First, there are no conflicts between the decisions of any federal appellate circuit courts and the decision reached by the Court of Civil Appeals. Petitioner has wholly failed to provide this Court with any conflicting circuit court decisions. Petitioner has cited *Peachtree Casket Direct, et al. v. State Board of Funeral Service of Georgia*, No. 1. 98-CV-3084-MHS to support its assertion of conflict of opinions. In reviewing *Peachtree*, it is clear that reliance on this case is misplaced. First, this is a District Court decision and has not become final. Next, and most important, *Peachtree* involves a statutory scheme that is clearly distinguishable from the Oklahoma statute. The Georgia District Court found the Georgia statute to be vague and, therefore, unenforceable. In the Georgia statute, the prohibition against selling caskets is found only in the definition provisions. (Appendix A). Unlike the Georgia statute, the Oklahoma statutes set out in two (2) separate provisions who may, or may not, sell caskets. (Petitioner's Appendix F6-F7).

Second, there are no substantive questions involved here. This Court has repeatedly held that there is a distinction between an important legal issue to the public and an important legal issue to the opposed party. *Layne A. Bowler Corp. v. Western Well Work, Inc.*, 261 U.S. 387, 393 (1923). In this case it is clear that the only interest involved is the interest of the Petitioner who would like to continue its illegal operation of the selling of caskets in the State of Oklahoma. At this time there are no other entities similarly situated as Petitioner in the State of Oklahoma.

Third, there is no public policy issue that will affect the State of Oklahoma's regulation of the funeral industry

as well as the constitutional rights of each citizen within the State. Petitioner asserts that there is such a concern; however, Petitioner did not make such assertion before the Oklahoma Supreme Court. Therefore, this should not be considered in this Court.

Fourth, the decision by the Court of Civil Appeals does not affect a substantial number of states. There are only six (6) states, including the State of Oklahoma, that have laws which limit the retail sale of caskets to licensed funeral directors and embalmers. In the past, this Court has granted certiorari in cases that involved important constitutional issues where the statutes in question were common to many jurisdictions. Thus, in *New York v. Ferber*, 458 U.S. 747, 749 FN2 (1982), this Court noted that the provisions of the New York Child Pornography statute under review had similar or identical counterparts in federal statutes and in statutes of forty-seven (47) other states. As previously noted, there are only five (5) other states that have statutes similar to Oklahoma's.

The Court of Civil Appeals' decision is completely in line with a long list of cases expounded by this Court, beginning with *Williamson v. Lee Optical*, 348 U.S. 483 (1955) and continuing through *City of New Orleans v. Duke*, 427 U.S. 297 (1976). The analysis used in an Equal Protection challenge under the United States Constitution has been well-stated in this line of cases. The Oklahoma Supreme Court has adopted the same approach and has frequently cited *Williamson* in cases involving equal protection challenges.

In the instant case, the Court of Civil Appeals relied upon the same equal protection analysis used in the

Williamson and *Duke* cases. (See Petitioner's Appendix A-4).

In reviewing the state statutes in question, the Court of Civil Appeals determined that the statutes were passed pursuant to the police powers of the state. The Court of Civil Appeals then determined that, as applied to Petitioner, the statutes did not infringe on a fundamental right nor did they create a suspect classification. The Court of Civil Appeals then determined that the statutes should be reviewed under the "rational basis" test. Like the Court in *Williamson* and *Duke*, supra, the Court of Civil Appeals was able to opine reasons for this legislation and concluded that the statutes were rationally related and, therefore, did not violate Petitioner's equal protection rights. Petitioner has proffered the case of *Romer v. Evans*, 517 U.S. 620 (1996), to support its contention that the case conflicts with Court of Appeals decisions. *Romer* is a case that is clearly distinguishable from the instant case. In *Romer*, the United States Supreme Court used a heightened standard of scrutiny when asked to review an amendment to the Colorado Constitution. The amendment made it illegal for any municipality or other government entity to pass any legislation that would protect the rights of gays and homosexuals, among other things.

In finding such classifications inherently suspect and repugnant to the Equal Protection Clause, the Court was unwilling to apply mere rationality to review the amendment. Instead, the Court reviewed the amendment with a heightened standard of scrutiny. The Court reasoned, where the statute on its face created a suspect class of individual (i.e. gays) and treated them different from

every other class and had a clear disparate impact on that group, the law, on its face, violated the Equal Protection Clause. This was evident in the following language:

> Amendment II confounds this normal process of judicial review. It is at once too narrow and too broad. It identifies persons by a single trait then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from state law is unprecedented in jurisprudence. *Romer v. Evans*, 517 U.S. 620 (1996).

Thus, it is clear that the *Romer* decision does not in any way stray from the Court's familiar equal protection analysis as expounded in cases such as *Williamson v. Lee Optical*. Instead, *Romer* represented the Court's effort to use a heightened standard of scrutiny in a situation where an amendment clearly creates a class solely for the purpose of imposing a different set of rules. The Court eagerly pointed out that the adverse impact that the amendment had on a disfavorite class was the apparent aim of the legislature. *Romer v. Evans*, 517 U.S. 620 (1996). Unlike *Romer*, the instant case does not create a discrete and insular class. To the contrary, the statutes in question are regulatory statutes enacted under the state's police powers. Therefore, review of rationality is all that was required in this case. Thus, reliance on *Romer* is misplaced.

There is no conflict with the Federal Trade Commission's (FTC) regulation of funeral service merchandise. Petitioner cannot cite any federal case law dealing with FTC regulations which conflicts with the Court of Civil Appeals decision. This is because the FTC regulations

deal mostly with pricing and sales practices in the funeral industry and not with licensing.

Petitioner also alleges that there was a due process violation when the Court of Civil Appeals ordered the injunction to be issued. This argument, too, must fall in that the only issue before the Court of Civil Appeals was whether the statutes were constitutional. It had previously been established, during the district court proceeding, that Petitioner was selling caskets without a license in the State of Oklahoma. The only issue was whether the statutes were constitutional. If the statutes are constitutional, then the injunction should have been issued to the State of Oklahoma. Having previously dealt with that issue in the district court, the Court of Civil Appeals determined that there was no reason to re-try those issues and that the injunction should be issued.

Petitioner incorrectly asserts that it will be treated differently in that out of state caskets may be used in the State of Oklahoma. It is Petitioner's assertion that this will occur because the F.T.C. rules require funeral homes to accept caskets purchased elsewhere. While it is true that the F.T.C. requires funeral homes to accept caskets purchased elsewhere, the F.T.C. does not address who may sell caskets in the State of Oklahoma. As a matter of fact, the Court of Civil Appeals addressed the issue of "contraband caskets" in its Opinion at FN4 (See Petitioner's Appendix at A-5).

CONCLUSION

This case involves a review of several pieces of economic legislation. These statutes were enacted to protect the public health, safety and welfare of the State of Oklahoma. They were passed pursuant to the state's police powers in response to an equal protection challenge. The Oklahoma Court of Civil Appeals relied upon the analytical approach used by this Court in a long line of cases beginning with *Williamson v. Lee Optical* and including *The City of New Orleans v. Duke* and concluded that there were no fundamental rights or suspect classifications involved. Thus, the statutes should be reviewed under the rational basis test. The Court of Civil Appeals, like this Court in *Duke* and *Williamson*, opined several reasons for these statutes and concluded that they were constitutional. This decision in no way conflicts with any federal appellate decision. Likewise, it is not in conflict with the Georgia District Court Opinion relied upon by Petitioner as the underlying statutes are totally distinguishable.

Contrary to Petitioner's assertion, the issues presented in this case will not have a great impact on public policy as only six (6) states, including Oklahoma, have similar statutes. Finally, Petitioner's due process was not denied in that all factual determinations were previously made in the district court proceedings.

For these reasons, the State Board of Embalmers and Funeral Directors respectfully requests this Court deny a Writ of Certiorari to the Supreme Court of Oklahoma.

Respectfully submitted,

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APPENDIX A

ARTICLE 1. FUNERAL DIRECTORS, EMBALMERS, AND OPERATORS OF FUNERAL ESTABLISHMENTS

PART 1. GENERAL INSTRUCTIONS

43-18-1 Definitions.

As used in this article, the term:

(1) "Alternative container" means any receptacle or enclosure which is of sufficient strength to be used to hold and to transport a dead human body.

(2) "Apprentice" means a person who practices embalming, funeral directing, or both, under the direct supervision of a funeral director, embalmer, or both, in this state.

(3) "Board" means the State Board of Funeral Service.

(4) "Casket" means a container which is designed for the encasement and viewing of a dead human body.

(5) "Cremation" means the reduction of the dead human body to residue by intense heat.

(6) "Crematory" means a place that is owned by a funeral director or funeral establishment where cremation is performed and which is open to the public.

(7) "Direct supervision" means that the embalmer, funeral director, or both, are present overseeing the activities of the apprentice.

(8) "Embalmer" means a person who practices embalming or uses in connection with that person's name

the words "embalmer," "licensed embalmer," "undertaker," or "mortician" or offers or holds himself or herself out as offering such services.

(9) "Final disposition" means the final disposal of a dead human body whether it is by, but not limited to, earth interment, above-ground interment, cremation, burial at sea, or delivery to a medical institution for lawful dissection if the medical institution assumes responsibility for disposal.

(10) "Funeral" or "funeral services" means the observances, services, or ceremonies held for dead human bodies.

(11) "Funeral director" means a person who practices funeral directing or uses in connection with that person's name or with a picture of that person the words "funeral director," "licensed funeral director," "undertaker," or "mortician" or offers or holds himself or herself out as offering such services.

(12) "Funeral director in full and continuous charge" means a funeral director who is approved by the board to assume full responsibility for the operations of a particular funeral establishment and who shall ensure that said establishment complies with this article and with all rules promulgated pursuant thereto.

(13) "Funeral establishment" means a place where embalming or funeral directing is practiced and which is open to the public and transacting business relating to funeral services.

(14) "Funeral merchandise" means the goods that may only be sold or offered for sale by a funeral director

working in a funeral establishment and includes, but is not limited to, a casket or alternative container, but does not include an outer burial container or cemetery marker.

(15) "Funeral service contract" means a written or oral agreement between a funeral director or funeral establishment and a legally authorized person for the embalming, funeral, or final disposition of a dead human body.

(16) "Legally authorized person" means the deceased's surviving spouse, a son or daughter who is 18 years of age or older; the deceased's parent, a brother or sister who is 18 years of age or older; any other person who is 18 years of age or older and who is in the next degree of kinship to the deceased; the deceased's guardian or personal representative; or a public health officer.

(17) "Outer burial container" means an enclosure into which a casket is placed, including, but not limited to, a vault made of concrete, steel, fiberglass, or copper, a sectional concrete enclosure, a crypt, or a wooden enclosure.

(18) "Practice of embalming" means disinfecting or preserving or attempting to disinfect or preserve dead human bodies by replacing certain body fluids with preserving and disinfecting chemicals.

(19) "Practice of funeral directing" means making or directing, at need or preneed, arrangements for the preparation and transportation of dead human bodies for final disposition and the supervision and direction of all funeral services.

(20) "Retort" means a furnace where dead human bodies are cremated.

(21) "Soliciting" means the making of any uninvited contact with another person by a funeral director or by a funeral director's agent, assistant, employer, or employee for the purpose of the sale of funeral services or merchandise but shall not mean any advertising which is directed to the public in general.

(Code 1981, § 43-18-1, enacted by Ga. L. 1990, p. 1372, § 1; Ga. L. 1992, p. 2762, § 1.)